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No. 677

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

MRS. HALLIE STIRLING TIGHE ..... Petitioner

VS.

MRS. BETTIE HALLIE STIRLING ROECKER,
MRS. NOLA CHILES and
UNITED STATES OF AMERICA ..... Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mrs. Hallie Stirling Tighe, makes this her Petition for Writ of Certiorari against Respondents, Mrs. Bettie Hallie Stirling Roecker, Mrs. Nola Chiles, and the United States of America, and prays the grant and issuance of the Writ, showing as follows:

DECISION TO BE REVIEWED

The decision and judgment concerning which certiorari is sought is of the United States Court of Appeals for the Fifth Circuit in Cause No. 21,926 styled "Mrs. Bettie Hallie Stirling Roecker, Individually and as Administratrix of the Estate of Samuel Carter Stirling, Deceased, and Mrs. Nola Chiles, Appellants vs. United States of America and Mrs. Hallie Stirling Tighe, Appellees", which is not yet reported either officially or

unofficially. A copy of the opinion in said cause is made a part hereof in the appendix hereto as Exhibit 1. The judgment of the Court of Appeals sought to be reviewed was entered on January 5, 1967, (R. 949-968, 969), and a timely Petition for Rehearing by petitioner was denied on July 3, 1967, (R. 994) on which latter date said judgment became final. The decision and judgment of the Court of Appeals reversed a judgment in favor of petitioner in the United States District Court for the Southern District of Mississippi, Jackson Division, in consolidated causes Civil Action No. 3019 and Civil Action No. 3219 styled respectively "United States of America, Plaintiff vs. Mrs. Hallie Stirling Tighe, et al, Defendants," and "Mrs. Bettie Hallie Roecker and Mrs. Nola Chiles, Plaintiffs vs. Mrs. Hallie Stirling Tighe, Defendant," the latter case having been removed to the District Court from the Chancery Court of the First Judicial District of Hinds County, Mississippi.

The case in the District Court, not officially reported, is unofficially reported at 229 F. Supp. 680 (1964), and a copy of the opinion in said cause is made a part hereof in the appendix hereto as Exhibit 2. (R. 886-902).

JURISDICTION

Jurisdiction to review the decision and judgment of the Court of Appeals by Writ of Certiorari is conferred on this Court by Title 28, *U. S. C.*, §1254(1) and §2101(c).

QUESTIONS PRESENTED

The questions presented for review are as follows:

1. Whether or not the Court of Appeals was incorrect and erred in failing to recognize that this case in the District Court was properly within the pendent jurisdiction of the District Court and in failing to recognize

that the District Court as a matter within its discretion properly applied the doctrine of pendent jurisdiction under *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933), as more recently announced in *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

2. Whether or not the Court of Appeals erred in holding that the issue of the authority of the guardian of an incompetent ward to change the beneficiary on the NSLI policy of the incompetent ward by and through court authority and in the best interest of the ward was an issue not to be decided by the District Court under its assumption of pendent jurisdiction as a discretionary matter but was an issue which should properly be remanded to the state court for final determination prior to ultimate disposition by the federal courts.

STATUTORY PROVISION INVOLVED

The statutory provision involved in this cause is the National Service Life Insurance Act of 1940, as amended, Title 38, *U. S. C.*, §784(a) 1964 Edition, Volume 8, Page 7173, cited as follows:

"§784. Suits on insurance

"(a) In the event of disagreement as to claim, including claim for refund of premiums, under contract of National Service Life Insurance, United States Government life insurance, or yearly renewable term insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the United States District Court for the District of Columbia or in the district court of the United States in and for the district in which such person or any one of them resides, and jurisdiction is

conferred upon such courts to hear and determine all such controversies. All persons having or claiming to have an interest in such insurance may be made parties to such suit, and such as are not inhabitants of or found within the district in which suit is brought may be brought in by order of the court to be served personally or by publication or in such other reasonable manner as the court may direct. In all cases where the Veterans' Administration acknowledges the indebtedness of the United States upon any such contract of insurance and there is a dispute as to the person or persons entitled to payment, a suit in the nature of a bill of interpleader may be brought at the request of the Veterans' Administration in the name of the United States against all persons having or claiming to have any interest in such insurance in the United States District Court for the District of Columbia or in the district court in and for the district in which any such claimant resides; however, no less than thirty days before instituting such suit the Veterans' Administration shall mail a notice of such intention to each of the persons to be made parties to the suit. The courts of appeals for the several circuits, including the District of Columbia, shall respectively exercise appellate jurisdiction and, except as provided in section 1254 of title 28, the decrees of such courts of appeals shall be final."

STATEMENT OF THE CASE

Facts

Samuel Carter Stirling served as an officer in the United States Navy during World War II, and while in service in 1942 he obtained a National Service Life Insurance policy on which he designated as beneficiary at that time his father, J. B. Stirling. J. B. Stirling

died on April 19, 1950. On May 1, 1950, Samuel Carter Stirling, the insured veteran, designated Mrs. Nola Chiles, a woman friend, as his beneficiary. In 1956 the insured veteran was adjudicated non compos mentis in the Chancery Court of the First Judicial District of Hinds County, Mississippi, and a guardian was appointed for him, in which guardianship the chancery court pursuant to the petition of the guardian entered a Final Decree in 1958 allowing the guardian to change the beneficiary on the NSLI policy of the insured veteran from Mrs. Nola Chiles to petitioner herein, Mrs. Hallie Stirling Tighe, sister of the insured veteran, finding that such change of beneficiary would be in the best interest of the insured incompetent veteran. A copy of said final decree is made a part hereof in the appendix hereto as Exhibit 3. (R. 34-38).

Pursuant to said Final Decree, the guardian executed and delivered a change of beneficiary to the Veterans Administration. The insured incompetent veteran died in 1959.

After his death, claims were made to the proceeds of the NSLI policy of the insured veteran by petitioner, Mrs. Tighe, and respondents, Mrs. Roecker and Mrs. Chiles. Thereupon an interpleader action was filed by respondent United States of America under the provisions of the National Service Life Insurance Act of 1940, as amended, Title 38, U.S.C. §784(a), supra.

Claims of Parties

Petitioner Mrs. Tighe claimed the proceeds of the policy by virtue of the change of beneficiary in her favor authorized by the Final Decree of the Chancery Court of Hinds County, Mississippi, and subsequently executed and delivered to the Veterans Administration by the

guardian of the insured incompetent veteran. Respondent Mrs. Chiles claimed such proceeds by virtue of her designation by the insured as beneficiary on May 1, 1950 subsequent to the death on April 19, 1950 of J. B. Stirling, father of the insured veteran and the originally named beneficiary, and averred that the insured veteran Samuel Carter Stirling was competent on and before May 1, 1950, at the time she was designated beneficiary. Respondent Mrs. Roecker claimed such proceeds in her name as the daughter of the insured veteran and in the name of the insured veteran's estate, she being his sole heir at law though estranged from him for more than twenty-five years and charging that the insured veteran was incompetent on May 1, 1950, after the death of J. B. Stirling, that therefore, he could not legally effect a designation of beneficiary of Mrs. Chiles; hence the proceeds of the policy inured to the estate.

Respondents Mrs. Chiles and Mrs. Roecker both averred that the Chancery Court was without any authority at law to authorize the guardian to change the beneficiary and further charged in concert against petitioner Mrs. Tighe that the final decree of the chancery court authorizing the change of beneficiary to petitioner was procured by fraud and was, therefore, void.

Proceedings in the District Court

After the filing of the interpleader suit in the District Court by respondent United States of America, the District Court assumed full jurisdiction of the case under the provisions of the National Service Life Insurance Act of 1940, as amended, Title 38, *U. S. C.*, §784(a), supra. The case proceeded toward trial through numerous discovery proceedings by the respective parties under the provisions of the *Federal Rules of Civil Procedure*,

when, on November 11, 1961, some three years after the rendition of the final decree of the chancery court and after the case had been pending in the District Court for more than a year, respondents Mrs. Roecker and Mrs. Chiles jointly filed in the chancery court a Bill in the Nature of a Bill of Review, which purported to make a "direct attack" on the final decree of the chancery court as being void for the same reasons as stated upon their claim in interpleader suit in the District Court. (R. 253-269).

On motion of petitioner, the state court suit was removed to the District Court and was consolidated with the pending interpleader action. No objection to the removal nor to the consolidation was made by respondents, and the case proceeded to trial before the District Court. The District Court thus assumed pendent jurisdiction of the state court suit as a part of the pending interpleader action without any objection on the part of claimant respondents and after hearing and trial held that the chancery court final decree was valid. (R. 886-902).

The decision and judgment of the District Court was in favor of petitioner against both of the claimant respondents, and she was awarded judgment for the proceeds of the NSLI policy in the sum of $10,000. In the decision and opinion of the District Court, all issues of fact and of law were resolved against the claimant respondents. See appendix, Exhibit 2. (R. 886-902). The District Court to some extent relied on the federal case of *Murray v. U. S.*, 107 F. Supp. 290 (1950), D. C., E. D. Mich.; aff. *Murray v. U. S.*, 188 F. 2d 362 (1951), C. A. 6, cert. den; *Murray v. U. S.*, 342 U. S. 816, 72 S. Ct. 30, 96 L. Ed. 617 (1951).

Proceedings in the Court of Appeals

On appeal from the decision and judgment of the District Court, claimant respondents again made no issue whatever as to the assumption of pendent jurisdiction by the District Court as a discretionary matter within its power and authority. In the decision and opinion of the Court of Appeals that Court held in ¶V C thereof (R. 967) that the removed state court suit and bill of review proceedings thereunder were not properly within the pendent jurisdiction of the District Court, and, therefore, was not removable as pendent to the interpleader action; hence the judgment in favor of petitioner should be vacated and the cause remanded to the District Court for further remand to the state court for a determination of the issues raised in the state court suit, viz. the validity of the chancery court final decree as a matter of state law. See appendix, Exhibit 1. (R. 949-968).

Petitioner filed a timely petition for rehearing arguing thereunder that the Court of Appeals had failed to recognize that the case was properly within the pendent jurisdiction of the District Court and had failed to recognize that the District Court as a matter within its discretion properly applied the doctrine of pendent jurisdiction under *Hurn v. Oursler,* 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933), as more recently announced in *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), (R. 971-993), which petition for rehearing was denied, (R. 994), and petitioner consequently obtained a timely stay of execution of the mandate of the Court of Appeals to permit the filing of this petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The reasons relied on by petitioner for the granting of the Writ of Certiorari are as follows:

1. The Court of Appeals has decided the issue of pendent jurisdiction in a way which is in conflict with the applicable decisions of this Court and more particularly in conflict with the decisions in *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933), and *United Mine Workers of America v. Gibbs*, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

2. In its holding on the issue of pendent jurisdiction the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The issue of pendent jurisdiction as currently involved in the case at bar involves legal questions which will be recurrent throughout the Federal judiciary.

4. The importance of the issue herein under the aspect of pendent jurisdiction is one of importance to the public as distinguished from importance only to the parties involved herein.

5. The actual practical effect of the decision of the Court of Appeals upon the issue of pendent jurisdiction will have far reaching adverse consequences for other litigants in other similar situations.

The Decision of the Court of Appeals is in Conflict with Decisions of Supreme Court of the United States

Petitioner contends that the decision of the Court of Appeals is in conflict with the decisions of this Court in *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed.

1148 (1933) and *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966), which cases delimited and defined the doctrine of pendent jurisdiction in the Federal judiciary.

In consideration of this issue, the argument hereunder will concern itself with that portion of the opinion of the Court of Appeals denoted as ¶ V C. (R. 967). Therein the Court of Appeals held that the Bill in the Nature of a Bill of Review filed by respondents Mrs. Roecker and Mrs. Chiles in the state court, and removed to the District Court on petition of petitioner herein, was not properly within the pendent jurisdiction of the District Court; hence the decision of the Court of Appeals to vacate the judgment and to remand the case for further proceedings in the state court.

The decision of the Court of Appeals in such respect appears to be grounded on the premise that the validity of the chancery court decree authorizing change of beneficiary under the NSLI policy in question was not an issue which was before the District Court. It is certainly not the purpose of petitioner to herein examine into issues of a factual nature as concerned in the voluminous record of the case or as outlined in the opinion of the Court of Appeals, with the single exception of the issue of *whether or not there was before the District Court the question of the validity of the decree.* This matter is the subject of argument herein only to the extent that the doctrine of pendent jurisdiction may be applicable in this case.

In the case in the District Court, *United States v. Tighe,* 229 F. Supp. 680, 683, 686 (1964), Appendix, Exhibit 2, the District Court both in giving its statement of the case and in its findings of fact and conclusions of

law recognized that one of the issues before it was the validity of the Chancery Court decree. The District Court stated without equivocation that the initial issue considered by the District Court was whether the Chancery Court had jurisdiction and authority to enter its final decree authorizing a change of beneficiary on the NSLI policy in dispute. (R. 890-891). It moreover unequivocally stated that the charges of invalidity of that decree on the basis of fraud as charged by respondents Mrs. Chiles and Mrs. Roecker were not proved and that hence the issue of the authority of the Chancery Court to enter its decree was dispositive of the respective claims of the parties in the District Court. (R. 891).

In consideration of the state court suit attacking the validity of the decree which was filed by claimant respondents the District Court stated that it had assumed full jurisdiction of the case under the provisions of the National Service Life Insurance Act of 1940, as amended, Title 38, *U. S. C.*, §784, and that consequently the state court suit must be dismissed because there was not any new evidence introduced at the trial of the case in the District Court which was sufficient to overthrow or set aside the decree. (R. 899-901).

In resume, it appears that the District Court recognized the validity of the Chancery Court decree as a paramount issue in the case and that such issue had been pointedly raised by claimant respondents Mrs. Roecker and Mrs. Chiles. Despite the fact that petitioner Mrs. Tighe made objection to the attack on the decree as being an improper collateral attack thereon, the District Court overruled all objections in that regard at the hearing and permitted extensive evidence by the two claimants in an effort to support their allegations that the Chancery Court decree was procured by fraud. The

District Court thus in effect permitted those claimants to make the direct attack on the decree which they sought to do by the bill of review. This issue and question of fact was then resolved against them in the findings and conclusion of the District Court. (R. 899-901).

It is likewise apparent from a reexamination of the record that the issue of the validity of the Chancery Court decree was an issue prevalent in both the bill of review and the interpleader action. This conclusion is readily gleaned both from examination of the pleadings of claimant respondents in the two actions and from an examination of the answer of respondent, Mrs. Roecker, to interrogatories propounded to her by petitioner Mrs. Tighe. (R. 40-43, 65, 253-267). See appendix, Exhibit 4 for excerpts from those pleadings.

The striking similarity of the two pleadings respectively in the interpleader action and the state court suit is readily apparent, and it is manifest therefrom that the issue of the validity of the decree was a paramount issue in both actions. There is little question but that this issue received the full attention of the District Court upon the trial of the case for it permitted all evidence introduced by respondents in their efforts to make a case of fraud in attacking the validity of the decree. Witness the evidence introduced by way of the testimony of Chancellors Robertson and Summer, which the District Court held insufficient to constitute proof of fraud. (R 395, 499) Even on the appeal to the Court of Appeals, respondent, Mrs. Roecker, specified as one of the errors alleged to have been committed by the District Court that it had erred in failing to find that the Chancery Court decree'' — was invalid because procured under circumstances which constituted legal fraud.'' (Brief of Appellant, Mrs. Bettie Hallie Stirling Roecker, p. 24)

Petitioner's position then on the petition for writ of certiorari is that even assuming that the District Court might have properly allowed the Chancery Court to proceed on the bill of review prior to the rendering of any decision in the District Court, it nevertheless also properly assumed pendent jurisdiction of the bill of review as a part of the whole case after its removal from the Chancery Court to the District Court.

Under the doctrine of pendent jurisdiction this was a matter fully within the power and authority of the District Court but moreover was a matter properly within the discretion of the District Court. The underlying theory of the doctrine of pendent jurisdiction is, of course, that the doctrine is applied in the interest of promotion of judicial economy and for the avoidance of piecemeal litigation.

Before further considering the application of the doctrine to the case at bar, it is well to consider the evolution of pendent jurisdiction from *Hurn v. Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933). The holding of *Hurn* broadly stated is as expressed in the opinion of the Court of Appeals in the instant case—that the Federal Court has original jurisdiction of a non-federal ground for relief when it is one of two distinct grounds for relief or two distinct grounds in support of a single cause of action. The Court of Appeals, of course, recognized in ¶ V C of its opinion that if the bill of review was simply the statement of another non-federal ground for the same relief sought in the interpleader action, the case was one for pendent jurisdiction on the part of the District Court, and this again recalls the question of — To what extent did the Federal Court consider the validity of the Chancery Court decree? Petitioner believes that citation to the above mentioned

portions of the record show conclusively that the extent of the consideration by the District Court as to the validity of the Chancery Court decree was indeed a far reaching one and that respondents had the benefit of presenting every shred of evidence which they could have presented in the State Court had not the Federal Court assumed pendent jurisdiction.

It can be determined from *Hurn* that where jurisdiction is founded on the presence of an issue of federal law — in this case jurisdiction under the federal law governing NSLI policies — a question of non-federal law may arise as a preliminary element, decision of which is essential to adjudication of the Federal issue. This was recognized even before *Hurn* in *Osborn v. Bank of the United States,* 22 U. S. (9 Wheat.) 738 (1824) (Opinion of Marshall C. J.) and it continues to remain applicable as flowing from *Osborn* and *Hurn.* This action is then likened unto the case at bar where it would be necessary, in the absence of pendent jurisdiction by the District Court, for the Chancery Court to make an adjudication under the bill of review as to the validity of the decree prior to a determination or any final adjudication in the interpleader action.

In fact, the Court of Appeals in its opinion said that this was the procedure that it expected upon remand to the District Court and further remand to the Chancery Court. The District Court, however, eliminated this as a necessary procedure in the case by its assumption of pendent jurisdiction of the preliminary element of determining the validity of the decree as raised under the bill of review.

Even under the situation posed by the Court of Appeals in its opinion that the interpleader action was concerned simply with the validity of the redesignation

of beneficiary, while the bill of review apart from this was concerned with the validity of the decree, it is seen that the further tests of *Hurn* are met. In *Hurn*, where the federal and non-federal grounds asserted were respectively copyright infringement and unfair competition, both claims depended upon precisely the same allegations of fact.

In the case at bar any issues or claims raised by the parties in either the federal or non-federal action depend upon the same allegations of fact and the same proof of those facts. As in *Hurn*, the District Court's findings on the federal claim contained every element necessary to support a conclusion as to the non-federal claim. Inasmuch as there is no difficulty in applying the *Hurn* theory upon the test of whether or not the federal claim is one of substance, the doubt which must be resolved is whether the federal and non-federal claims are but different grounds in support of a single cause of action. The ultimate aim of all three of the claimants was, of course, in being named the rightful beneficiary of the proceeds of the NSLI policy of Samuel Carter Stirling, and the aim thereunder of respondent, Mrs. Roecker by the bill of review was, of course, in the premise that if the decree be declared invalid Mrs. Roecker sought the proceeds as the estate of the deceased veteran. The end result is all too clear — whether viewed under the bill of review or under the interpleader action.

The tests of *Hurn* go even further in seeking to determine whether the federal and non-federal claims are but different grounds in support of a single cause of action. The federal and non-federal claims must involve the same parties concerning which there is, of course, no question in the case at bar that this test is met. Further determination says *Hurn* is whether the federal and

non-federal claims rest upon identical facts and are little more than the equivalent of different epithets to characterize the same group of circumstances.

It is submitted in this regard as to the case at bar that every allegation of the bill of review was the subject of evidence introduced in behalf of respondents in an effort to show fraud and the invalidity of the Chancery Court decree. In other words, every item of proof which could have been introduced by respondents in the Chancery Court to support these allegations was in fact introduced and received in evidence by the District Court. If, as it has been stated in the opinion of the Court of Appeals, there was an issue in the District Court of the validity of redesignation of the beneficiary of the NSLI policy apart from the validity of the decree issue, still all of the allegations in regard to both and evidence in regard to both may be characterized as constituting precisely the same group of circumstances. Stated otherwise, the operative facts of one are the operative facts of the other.

Another test of *Hurn* is whether there be overlapping evidence between the federal and non-federal claims. In the case at bar not only does the evidence overlap, it is precisely the same as to the federal and non-federal claims. There is sometimes difficulty in determining whether proof of the federal claim and of the non-federal claim is the same or is overlapping, and this is particularly true where a decision as to pendent jurisdiction is made in the District Court prior to the time the evidence is introduced and is available for consideration by the District Court prior to decision. Not so the situation where a case has been finally adjudicated in the District Court and the evidence has been received and the record is before the appellate court where a full

examination of such evidence can be made as to its similarity or overlapping.

Petitioner herein recognizes that the application of pendent jurisdiction is not a right to one or the other parties to the litigation to be applied by the District Court but is a matter properly within the discretion of the District Court, and following therefrom it would appear that where the appellate court believes the District Court to be in error in its assumption of pendent jurisdiction there is a requirement on the part of the appellate court that a finding be made that the District Court had exceeded its discretion in assuming pendent jurisdiction, bearing in mind that the discretion of the District Court is to be exercised in keeping with the underlying theory of pendent jurisdiction in the interest of promotion of judicial economy and avoidance of piecemeal litigation. This the Court of Appeals did not do!

A recent and far reaching pronouncement concerning the doctrine has been made by the Supreme Court in *United Mine Workers of America v. Gibbs,* 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). In the cited case, this Court seemed to stray from any limited concept under *Hurn* to a broad concept which would more fully effectuate the theory of pendent jurisdiction. Pendent jurisdiction, unlike the statutory defined concepts of original jurisdiction and removal jurisdiction has been judicially created and has evermore evolved toward the effectuation of the theory of promotion of judicial economy, convenience and fairness to parties, and avoidance of piecemeal litigation.

Moreover, in *Gibbs* this Court appears to abandon any strict application of the cause of action test enunciated by *Hurn* and to have focused more upon the relevant underlying policies of judicial economy, convenience and

fairness to parties and avoidance of piecemeal litigation, leaving to the lower courts' discretion the disposition of the appropriate policy in particular fact situations.

Gibbs, as the first definitive analysis of pendent jurisdiction by this Court in more than thirty years decried the narrow application of the doctrine emphasizing that this was not consistent with the policy of the new federal rule of entertaining the broadest possible scope of action in the Federal Court, and, therefore, the approach adopted in *Gibbs* was one consistent with the policies underlying the federal rules. In other words, under *Gibbs* the judicial power to consider pendent state suits was to be broadly construed but the District Courts were to have wide discretion in exercising this power. This Court expounded at some length on the policy considerations which should guide the District Courts in the exercise of discretion in this matter.

It is also significant that at no point in this litigation have claimant respondents or either of them raised any question as to the propriety of the District Court in its assumption of pendent jurisdiction. No motion to remand the state or non-federal action to the Chancery Court was made. No objection was made to the motion of petitioner to consolidate the federal and non-federal actions in the District Court. No objection or specification of error in this regard was made by respondents in the Court of Appeals.

In consideration, therefore, of *Hurn* and *Gibbs,* it is manifest that the decision in those cases calls for a liberal effectuation under the federal rules of the doctrine of pendent jurisdiction, however leaving the matter of exercise of pendent jurisdiction to the sound discretion of the District Court. The simple fact of the matter in this case is that the District Court exercised this discretion

and assumed pendent jurisdiction notwithstanding which the Court of Appeals overturned the decision of the District Court precisely on the issue of jurisdiction and moreover on an issue of jurisdiction which was not raised at any stage of the proceedings in opposition to the action of the District Court in assuming pendent jurisdiction. This cannot be said to be a decision by the Court of Appeals which is not in conflict with the decisions in *Hurn* and *Gibbs*.

The Court of Appeals in the case at bar did precisely what *Hurn* and *Gibbs* sought to move away from in the evolution of the improvement of judicial procedure through pendent jurisdiction. This is not a situation where the Court of Appeals has simply acted in contravention of certain *principles* laid down in *Hurn* and *Gibbs*. It is a situation where the Court of Appeals has acted in direct contravention of the *decisions* in those cases. Only by the granting of the Writ of Certiorari and consequent consideration by the Court of this case and the conflict in decision raised herein as it affects the doctrine of pendent jurisdiction can the conflict be resolved.

In its Holding on the Issue of Pendent Jurisdiction the Court of Appeals Has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Power of Supervision of the Supreme Court.

It is seen from an examination of the procedural handling of this case by the District Court that it did in fact assume pendent jurisdiction of the state court suit as pendent to the interpleader action in the District Court. It is also seen that the tests of *Hurn* in establishing this case as one proper for the exercise of pendent jurisdiction by the District Court as a discretionary mat-

ter have been met. But what of the modern view of pendent jurisdiction under this Court's holding in *Gibbs*? More importantly, what of the effect of the decision of the Court of Appeals in this case as to the expected or prospective application of the doctrine of pendent jurisdiction in the United States Fifth Circuit?

For the purposes of this argument may we assume that the District Court properly assumed pendent jurisdiction, and may we assume that the Court of Appeals was in error in reversing the District Court on this feature of the case—purely a discretionary matter for the District Court? Admitting that this Court's considerations for the grant of certiorari go deeper than considerations as concern solely the interests of private parties to litigation, it is urged here that the decision in this case by the Court of Appeals can be considered nothing less than a narrowing of the doctrine of pendent jurisdiction as did the Federal Courts in such cases as *Foster D. Snell, Inc. v. Potters,* 88 F. 2d 611, C. A. 2 (1937) and *Musher Foundation, Inc. v. Alba Trading Co.,* 127 F. 2d 9, C. A. 2, cert. den. 317 U. S. 641 (1942), which cases were in the tradition of narrow application of the doctrine of pendent jurisdiction under *A. Leschen & Sons Rope Co. v. Broderick & Bascom Rope Co.,* 201 U. S. 166 (1906).

This Court has under *Gibbs* departed from this narrow application view and has done so to more fully effect the intent and purpose of the *Federal Rules of Civil Procedure* which in themselves call for the same thing which the doctrine of pendent jurisdiction calls for, namely judicial economy, convenience and fairness to parties and avoidance of piecemeal litigation. Thus the Court of Appeals has adopted for the Fifth Circuit in the instant case a narrow view which not only departs from the

doctrine of pendent jurisdiction but moreover departs from the intent and purpose of the *Federal Rules of Civil Procedure* and thusly departs from the Federal Rules themselves.

It, therefore, becomes incumbent on this Court to act within its supervisory powers to cause a recognition of the scope of pendent jurisdiction which *Gibbs* calls for. There can be no judicial economy or avoidance of piecemeal litigation in a United States Judicial Circuit where the view is taken by the appellate court that matters of state law of which the trial court assumes pendent jurisdiction within its discretion are not actually subject to pendent jurisdiction by the trial court but should be remanded to state courts for determination thereby taking from the District Court its discretion in the matter. Witness the expected further processing of this case under the holding of the Court of Appeals. Under the directions of the Court of Appeals this case would proceed on remand to the District Court and thence to the Chancery Court where a hearing on the issue of the validity of the Chancery Court decree would be held with a consequent appeal by the unsuccessful party from the decision in the Chancery Court to the Supreme Court of Mississippi, following which the case would be remanded again by the state appellate court to the trial court and thence to the District Court for supposed ultimate disposition. Further appeals to the Court of Appeals might then result and even further applications to this Court.

To view the matter in the abstract it likewise can be said that under a narrow view of pendent jurisdiction which the District Courts would be bound to follow under the holding of the Court of Appeals in this case, other litigants would also have the same legal pattern of

procedure to follow. This cannot be in the spirit of or within the intent and purpose of the doctrine of pendent jurisdiction and the Federal Rules and represents a drastic departure therefrom by the Court of Appeals.

There is little question that under these circumstances the actual practical effect of the decision of the Court of Appeals upon the issue of pendent jurisdiction will have far reaching adverse consequences for other litigants in other similar situations, and it is respectfully submitted that this Court should in the exercise of its supervisory powers, as was done in *Gibbs*, correct the misapplication or non-application of the ever evolving doctrine of pendent jurisdiction. For other authority illustrating the evolution and scope of the doctrine, see: *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909); *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959); *Railroad Commission v. Pacific Gas & Electric Co.*, 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938); *Hillsborough Tp. v. Cromwell*, 326 U. S. 620, 66 S. Ct. 445, 90 L. Ed. 358 (1946); *Mihalic v. Cleveland Tanks, Inc.*, 364 U. S. 325, 81 S. Ct. 6, 5 L. Ed. 2d 20 (1960); *Sterling v. Constantin*, 287 U. S. 378, 393-94 (1932); *Greene v. Louisville & I. R. R.*, 244 U. S. 499, 508 (1917).

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BOWMAN STIRLING TIGHE
Counsel for Petitioner

APPENDIX

Exhibit 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21926

MRS. BETTIE HALLIE STIRLING ROECKER, Individually and as Administratrix of the Estate of Samuel Carter Stirling, Deceased and MRS. NOLA CHILES ..... Appellants

versus

UNITED STATES OF AMERICA, ET AL ... Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

(January 5, 1967.)

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: These cases, consolidated in the District Court, seek to determine the lawful beneficiary of a $10,000 National Service Life Insurance policy on the life of the late S. Carter Stirling. One case is an interpleader action brought by the United States as the insurer. See 38 U.S.C. § 784(a).

*Of the District of Columbia Circuit, sitting by designation.

The other is an action in the nature of a bill of review removed to the district court from the Chancery Court of the First Judicial District of Hinds County, Mississippi. We hold that the bill of review was improperly removed, and that the final determination of the interpleader action must await the outcome of the state proceedings on the bill of review.

• • • •

A long, unedifying tale lies behind the twistings and turnings in this case. S. Carter Stirling, a bachelor in Jackson, Mississippi, for most of his life, made one short excursion into matrimony. In 1930 he married; in 1936 his wife divorced him, taking with her to California, a daughter, now Mrs. Bettie Stirling Roecker, one of the claimants in this case. After the divorce, Stirling turned to the company of a hometown widow, Mrs. Nola Chiles, another claimant here.

During World War II he served as an officer in the Navy, and while in the service in 1942 procured the policy here in question. He named his father, General J. B. Stirling, as beneficiary.

After the war, Stirling, a chronic alcoholic, suffering from obesity and high blood pressure had a series of strokes, starting in April-August 1947. By 1955 he was almost totally incapacitated. Meanwhile in 1950, his father, the named beneficiary of the insurance policy, died. Within three weeks Stirling changed the beneficiary of the insurance policy to his friend, Mrs. Chiles. In 1956, on the petition of Stirling's nephew, B. Stirling Tighe, an attorney, the Chancery Court of the First Judicial District of Hinds County (Jackson), Mississippi, declared Stirling non compos mentis, and appointed William S. Moore as his guardian. Mr. Tighe was and continued to be the guardian's attorney.

That was the picture before family legal maneuvers complicated the case. Less than three months after Stirling was declared incompetent, Mr. Tighe petitioned the chancery court to allow the guardian to change the beneficiary of the life insurance policy to the attorney's mother, Mrs. Hallie Stirling Tighe, S. Carter Stirling's sister, and to name the attorney and his sister as joint alternate beneficiaries. The petition recited that Mrs. Tighe was Stirling's next of kin, the natural object of the bounty of the insured. The chancellor (Judge Robertson) informed Mr. Tighe that he was not inclined to grant the change of beneficiary unless Mrs. Chiles, the designated beneficiary, had an opportunity to be heard. Mr. Tighe then advised the court that he would hold the matter in abeyance while he researched the question whether the beneficiary could be designated ex parte. The Administrator of Veterans Affairs, who was made respondent to the petition, filed an answer neither objecting nor waiving objection to the petition but pointing out that Mrs. Roecker rather than Mrs. Tighe was the insured's next of kin. At this point the guardian, through Mr. Tighe, filed an amended petition recognizing, for the first time, Mrs. Roecker's existence, but denying that she had a close relationship with her father and asserting that Mrs. Tighe had taken good care of the ward for years. The chancellor then advised Mr. Tighe that before he would change the beneficiary, he would want to hold a hearing to which *both* Mrs. Chiles and Mrs. Roecker should receive notice and an opportunity to be heard and represented. Mr. Tighe asked the court once again to hold the matter in abeyance.

About a year and a half later, in 1957, Mr. Tighe, by letter to Mrs. Roecker, offered to initiate proceedings to have the beneficiary of the policy changed to the

ward's estate (of which Mrs. Roecker was the sole heir), if Mrs. Roecker would agree to assign a one-half interest in the estate to his mother. When she refused to agree, he proposed a fifty per cent fee contingent on his obtaining the court's permission to name the estate as the beneficiary. Although Mrs. Roecker never agreed to any of these arrangements, in May 1958 the guardian petitioned the chancery court for permission to designate the estate as beneficiary. The petition asked as well for a fifty per cent contingent fee "to Tighe and Tighe, [the guardian's] . . . attorneys, for their services in instituting such action in his behalf." (Apparently because the federal law, 38 U.S.C. § 748(g), prohibits attorney fees of more than 10% being taken out of the insurance proceeds, this petition requested that the fee be allowed out of the balance of the ward's estate.) The Administrator of Veterans Affairs waived any objection to the proposed change of beneficiary but asserted that any attorney's fees should be only nominal. Judge Robertson, after another conference with Mr. Tighe, granted the guardian permission to change the beneficiary to the estate, but reserved judgment on the fifty per cent fee, saying that it would be best to wait to see how much work was required.

Neither the guardian nor Mr. Tighe took any steps to make the authorized change. Instead, late in 1958, Mr. Tighe reactivated the original petition seeking to designate his mother as beneficiary. He consulted a newly appointed chancellor, Judge Summer, although Judge Robertson was available at the time. Judge Summer testified in this case that he did not recall Mr. Tighe's mentioning the prior proceedings to him; that had he known of Judge Robertson's connection with the case, he would have consulted him before taking any action; that he probably would have decided differently

if all the facts had been shown as they were in the district court. Not knowing of the prior proceedings, Judge Summer held an ex parte hearing in December 1958 on the question of designating Mrs. Tighe as beneficiary. At the hearing, Mr. Tighe produced evidence tending to show that Mrs. Roecker had almost no contact with her father, that Stirling had been incompetent in 1950, and that Mrs. Tighe took kind and considerate care of her brother. No evidence to the contrary was presented, since the hearing was ex parte. Judge Summer found that Stirling had been incompetent in 1950, and that the best interest of the ward would be served by designation of Mrs. Tighe as beneficiary. December 19, 1958, Judge Summer entered a final decree granting the guardian's petition and ordered that the beneficiary be changed to Mrs. Tighe.

Two weeks later Carter Stirling died. Mrs. Tighe, Mrs. Chiles, and Mrs. Roecker all filed claims for the life insurance proceeds. Mrs. Tighe based her claim on the redesignation of beneficiary ordered by Judge Summer. Mrs. Chiles based her claim on the original redesignation by the insured in 1950. She argued that Stirling was competent at the time, and that the redesignation ordered by the court was null and void. Mrs. Roecker, while she agreed with Mrs. Chiles that the court-ordered redesignation should not be given effect, maintained that her father was incompetent in 1950 because of alcholism, that his designation of Mrs. Chiles was therefore invalid, and that since the designated beneficiary, her grandfather, had predeceased the insured, the proceeds passed by law to his estate.

Upon receipt of the three conflicting claims, the United States brought the present interpleader action to determine which of the three claimants is entitled to the life

insurance proceeds. While that action was pending in the district court, Mrs. Chiles and Mrs. Roecker, having learned of the court-ordered redesignation in favor of Mrs. Tighe, filed in the Chancery Court for the First Judicial District a bill in the nature of a bill of review.[1] They asked the court to set aside its former judgment on the ground, inter alia, that the judgment had been procured by the fraud of Mr. Tighe, the guardian's attorney. The fraud consisted, so the plaintiffs alleged, in Mr. Tighe's failure to inform the court of Mrs. Roecker's existence until forced to do so by the VA, his failure to notify Mrs. Chiles and Mrs. Roecker of the hearing so that they could appear and present evidence, his failure to disclose to Judge Summer that Judge Robertson had previously refused to redesignate the beneficiary in favor of Mrs. Tighe in an ex parte proceeding, and his failure to present evidence to Judge Summer which, according to the plaintiffs, was known to him and would have shown that Stirling was competent in 1950, and that there was a continuing love and affection between Mrs. Roecker and her father. Mrs. Tighe removed this action to the district court where it was consolidated with the interpleader action. Neither Mrs. Chiles nor Mrs. Roecker objected to the removal.

The case was tried without a jury. The district judge found that Stirling had been non compos mentis in 1950, and that his designation of Mrs. Chiles was therefore of no effect; that Judge Summer's ex parte redesignation in favor of Mrs. Tighe was proper; that Mrs. Roecker and Mrs. Chiles could not collaterally attack Judge Summer's decree in the federal court; and that there had been no fraud in the procurement of the redesignation. Accordingly, he awarded the proceeds of the policy to

[1] See Griffith, Mississippi Chancery Practice § 642 (2 ed. 1950).

Mrs. Tighe. *United States v. Tighe,* S. D. Miss. 1964, 229 F. Supp. 680. We affirm in part and in part vacate the judgment of the district court and remand for further proceedings.

I.

The record contains a great deal of evidence relating to Stirling's mental condition in 1950. While the evidence is in conflict, we cannot say, after examining the voluminous record, that the district judge was clearly erroneous in finding Stirling incompetent as of May 1, 1950. We therefore affirm that part of the judgment denying the claim of Mrs. Chiles. This holding does not affect Mrs. Roecker and Mrs. Tighe. Their claims turn on that validity of the change of beneficiary ordered by the Hinds County Chancery Court in December 1958.

II.

The construction of a life insurance policy issued by the United States, is, of course, governed by federal law. *Wissner v. Wissner,* 1950, 338 U. S. 655; *Woodward v. United States,* 8 Cir. 1948, 167 F. 2d 774, rev'd on other grounds, 1951, 341 U. S. 112, 71 S. Ct. 605, 95 L. Ed. 806. The federal statute governing changes in the beneficiary of a NSLI policy is 38 U.S.C. § 717:

> (a) The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries.

The regulations provide:

> The insured shall have the right at any time, and without the knowledge or consent of the beneficiary

> to cancel the beneficiary designation, or to change the beneficiary . . . A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent, and must contain sufficient information to identify the insured. . . . 38 C.F.R. § 8.47 (1966).

A. Mrs. Roecker argues that since the insured did not personally sign the notice of change, the change was invalid and should be given no effect. Her argument is without merit. The purpose of the statute was to confer on the insured plenary power to change the beneficiary of his policy. *Wissner v. Wissner, supra.* But the law does not provide for the eventuality that the veteran insured would become incompetent. We read the word "competent" into the Act. Although the language of the regulation, read literally, requires the insured to sign the request for change of beneficiary, Congress and the VA surely did not mean to bind the United States to every whim of a lunatic. When it declared that the insured was to have the absolute right to change the beneficiary, Congress operated "against the background . . . of [the] basic principle" in our jurisprudence[2] that an incompetent may not validly dispose of his property. See, e.g., 3 Pomeroy, Equity Jurisprudence § 946 (5 ed. Symons 1941). Since it is evident, at least to this Court, that Congress did not intend such an anomalous result, we need not follow the strict language of the regulation. See *Church of the Holy Trinity v. United States,* 1892, 143 U. S. 457; *Murray v. United States,* E. D. Mich. 1950, 107 F. Supp. 290, aff'd, 6 Cir. 1951, 188 F. 2d 362, cert. denied, 1951, 342 U. S. 816, 72 S. Ct. 30, 96 L. Ed. 617. Mrs. Roecker's

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[2] Mishkin & Morris, On Law in Courts 349 (1965).

argument that the 1958 redesignation was invalid because it was not signed by the insured must fail.

III.

The federal statute is silent as to the manner in which a guardian may change the beneficiary of an incompetent's insurance policy. The question arises, therefore, whether the court should incorporate state law to resolve that issue or fashion an independent federal doctrine as part of federal common law. See Mishkin, "The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 811 (1957).[3] In exercising this judicial discretion in favor of state law, the federal court is not denying its competence to make an independent judgment, but is in fact making a choice clearly within its competence. "In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state." Justice Jackson in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation,* 1942, 315 U. S. 447, 471, 62 S. Ct. 676, 86 L. Ed. 956, 26 Minn. L. Rev. 899.

Many considerations bear on the decision whether to apply state law or to fashion federal law. For example, where the particular question under the federal act depends on a status traditionally governed by state law, the federal court may infer that Congress, legislating

[3] See also Clearfield Trust Co. v. United States, 1943, 318 U. S. 363, 63 S.Ct. 573, 87 L.Ed. 838; Friendly, In Praise of Erie-And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964); Morgan, The Future of a Federal Common Law, 14 Ala. L. Rev. 10 (1964); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084 (1964); McKenna v. Wallis, 5 Cir. 1965, F.2d (dissent), rev. US. , Wright, Federal Courts § 60, p. 213-218 (1963).

against this background of state law, intended that law to govern. See *De Sylva v. Ballantine,* 1956, 351 U. S. 570, 76 S. Ct. 974, 100 L. Ed. 1415. Similarly, where application of state law would not interfere with the federal program, but application of federal law would disrupt state agencies, state law should be applied, *RFC v. Beaver County,* 1946, 328 U. S. 204, S. Ct. 90 L. Ed. 1172. But where the state law conflicts with the federal statute, the state rule will not govern. *Wissner v. Wissner.* And, of course, the court will fashion federal law where nationwide uniformity is necessary to protect a federal program. *Textile Workers Union v. Lincoln Mills,* 1957, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972.

Each case must be decided on the basis of the statutory program involved and the precise question to which whatever law is chosen will be applied. See *Mishkin, supra* at 802-14. In this case, we conclude that state law should govern.

In *Dyke v. Dyke,* 6 Cir. 1955, 227 F. 2d 461, cert. denied, 1956, 352 U. S. 850, 77 S. Ct. 70, 1 L. Ed. 2d 61, the court held that the mental competence of an insured veteran to change the beneficiary of his policy was to be decided by federal law. The veteran had been declared incompetent by a Tennessee state court. Following a period of confinement in a Veterans' Administration hospital, the veteran was released as competent. Thereafter he changed the beneficiary of his policy from his mother to his wife and child. Under Tennessee law, an adjudication of incompetence is conclusive of continued incompetence until removed by an adjudication of competence. A court had never declared the veteran competent. The federal court refused to apply the state law, and recognized the change of beneficiary. While there

may be a sound basis for that decision,[4] the question was different from that presented in this case. There the problem was whether the insured's own change of beneficiary was valid. But here the question is not the insured's competence, but the propriety of a guardian's discharge of his duties to his ward. A federal court would not fashion a federal rule governing the appointment of guardians for incompetents. See Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn. L. Rev. 1, 36 (1956). It would be equally incongruous for a federal court to attempt to develop standards for the management of an incompetent's estate.

To apply state law to this question does not offend congressional policy. Here there is no overpowering reason in favor of a uniform rule of nationwide application. In fact to apply a federal standard would unnecessarily complicate the duties of guardians, who would have to adhere to one standard when dealing with most of a veteran's affairs, but to another when dealing with his government insurance policies. *United States v. Murray,* E. D. Mich. 1950, 107 F. Supp. 290, aff'd, 6 Cir. 1951, 188 F. 2d 362, cert. denied, 1951, 342 U. S. 816, 72 S. Ct. 30, 96 L. Ed. 617, dealt with the propriety of a guardian's redesignation of the beneficiary of an incompetent veteran's NSLI policy. The court decided to apply state law. We think it was correct, and that Mississippi law should govern this case.

IV.

The step which follows a conclusion that a question is to be governed by state law is the ascertainment of

[4] See Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 816-20 (1957).

what the state law is. This is a particularly difficult task in the present case. There is no Mississippi case precisely in point other than the decision of the Hinds County Chancery Court in this case. It held, of course, that with the approval of a chancery court secured in an ex parte proceeding, a guardian may change the beneficiary of an incompetent's life insurance policy from a beneficiary named by the insured to a collateral relative of the insured. There are arguments both for and against the wisdom of such a decision. As the parties conceded the standard by which the propriety of the guardian's action is to be measured is the "best interest of the ward". The argument advanced by Mrs. Tighe—that whatever the ward would have done had he been competent is what is "in his best interest"—is speculative and tenuously subjective. On the other hand, a collateral relative may be that natural object of the ward's bounty in the factual context of a particular case. The procedural question is also open to debate. Even though the regulation allows a veteran to change the beneficiary of his policy without the former beneficiary's knowledge or consent, it does not necessarily follow that such a change may be made by a guardian after an ex parte proceeding in the chancery court. *But see United States v. Murray.* Different considerations may apply to the case in which the guardian seeks to change the beneficiary to the estate in an ex parte proceeding and that in which he seeks to designate a third person.[5] This seemed to be Judge Robertson's view in this case.

Had Judge Summer's decision been rendered in an unrelated case, this Court would certainly not be bound to follow it. Even where state law applies of its own

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[5] For example, designation of the estate may make it easier for the guardian to obtain credit for the ward. *Cf.* Murray v. United States, supra at 294.

force, as under *Erie R.R. v. Tompkins*, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, a federal court need not necessarily defer to state trial court decisions. *King v. Order of United Commercial Travelers of America*, 1948, 333 U. S. 153, 68 S. Ct. 488, 92 L. Ed. 608.[6] As in *King*, the Hinds County Chancery Court is not a court of statewide jurisdiction, as was the New Jersey chancery court in *Fidelity Union Trust Co. v. Field*, 1940, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 109. See Miss. Const. art. 6, § § 152, 164; Griffith, Mississippi Chancery Practice § 85 (2 ed. 1950). Its decisions are not reported, and thus are not available for use as precedent by other courts throughout the state. In similar circumstances, the Supreme Court in *King* decided that the federal court need not follow the trial court decision. The parties in the federal court, it reasoned, should not be bound by a decision that is not necessarily the law of the state, especially when the decision, because it is unpublished, would be available only to a litigant able to afford to research the records of each county court.

These factors are not present in this case. Where the state trial court decision was rendered in a controversy involving the same subject matter and the same interests of the same parties as are present in the federal proceedings, there is no danger that it does not represent the state law. Here, as to these parties, Judge Summer's decision *is* the state law of this case. And, since the same parties are involved, the fact that the decision was unreported loses its significance.

If there were no question of the validity of Judge Summer's decision, we would be bound to follow it. We would affirm the district court's result and award the insurance proceeds to Mrs. Tighe.

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[6] Note the distinction drawn between this situation and the *Erie* situation in Mishkin, supra note 3, at 802-10.

V.

The solution is not as simple as the statement of the hypothetical. There is a very serious question as to the validity of Judge Summer's decision. Mrs. Roecker and Mrs. Chiles, in their bill in the nature of a bill of review, charge that the decision was the result of fraud on the chancery court. Their allegations are not frivolous. Mrs. Tighe's attorney, they charge, withheld evidence from the court. According to the plaintiffs, he chose to bring his petition before a newly appointed judge and did not reveal that another more experienced judge had refused to take the action requested. This bill of review was removed from the state chancery court to the district court. The action was not within the original jurisdiction of the district court and should therefore have been remanded. *American Fire & Casualty Ins. Co. v. Finn*, 1951, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702.

The Judicial Code provides that a civil action may be removed from a state court to a federal district court when the case would have been within the federal court's original jurisdiction. 28 U.S.C. § 1441(a). Original federal jurisdiction exists where there is diversity of citizenship, 28 U.S.C. § 1332, where the matter in controversy "arises under the Constitution, laws, or treaties of the United States", 28 U.S.C. § 1331, or where jurisdiction is conferred by a special statute.

A. The record discloses that there was no diversity of citizenship in the removed case. At the time the pleading was filed, Mrs. Roecker, one of the plaintiffs, was a citizen of California. Mrs. Chiles, the other plaintiff, was a citizen of Mississippi. Mrs. Tighe, the defendant, was also a citizen of Mississippi. Complete diversity did not exist and hence the district court would

not have had original jurisdiction of the case. *Strawbridge v. Curtiss,* 1806, 3 Cranch. 267, 2 L. Ed. 435.

Even though Mrs. Chiles has since moved to Texas, the case must be remanded. In order for a case to be removable on the ground of diversity, diversity must exist at the time the state action is commenced. *Jackson v. Allen,* 1889, 132 U. S. 27, 10 S. Ct. 9, 33 L. Ed. 914; 1A Moore, Federal Practice ¶ 0.161[1], at 528, ¶ 0.157[12], at 382.

B. The question whether a guardian's redesignation of a National Service Life Insurance beneficiary is valid is, in a sense, a federal question. It would not arise but for the federal statute. We have held, however, that state law is to govern the propriety of the guardian's action. The question is, therefore, whether a claim which depends on state law incorporated into a federal statutory program "arises under" the laws of the United States. The Supreme Court has answered this question in the negative. *Shoshone Mining Co. v. Rutter,* 1900, 177 U. S. 505, 20 S. Ct. 726, 44 L. Ed. 864. There a federal statute expressly provided that "adverse suits" "may be determined by 'local customs or rules of miners in the several mining districts . . .' ". 177 U. S. at 508. Such suits, the Court reasoned, did not arise under the Constitution or laws of the United States. "The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law". *Ibid.* Therefore, "in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact." *Ibid.* See also *Gully v. First National Bank in Meridian,* 1936, 299 U. S. 109, 57

S. Ct. 96, 81 L. Ed. 70; *Skelly Oil Co. v. Phillips Petroleum Co.*, 1950, 339 U. S. 667, 70 S. Ct. 876, 94 L. Ed. 845. While here the federal statute does not expressly command reference to state law, we have decided that state law governs the decision of the question before us. We fail to see any meaningful distinction. The reasoning of the *Shoshone* case leads to the conclusion that the propriety of the guardian's redesignation raises no federal question.

The question presented by the bill of review is even further removed from the federal statute involved. Precisely stated, it is whether the judgment of the Chancery Court of Hinds County was procured by fraud. Under Mississippi practice, the action in the nature of a bill of review is an original action. See *Cole v. Miller*, 1856, 32 Miss. 89, 101; Griffith, Mississippi Chancery Practice § 635, at 695, § 642 (2 ed. 1950). The only question presented is whether the decree is void. If the court finally determines that its decree was procured by fraud, it will set the decree aside and start afresh, as if the original proceedings had never taken place. *Cf.* Griffith, § 635, at 696. The new decree will be based on new evidence introduced at a new hearing. The bill of review does not raise the question whether Mississippi law permits a redesignation such as Judge Summer ordered. The only question it raises is whether the chancery court was a victim of fraud. We cannot imagine a question more properly within the competence of the state court and the state court only. This could not conceivably be a federal question. It could not possibly be the basis for removal.

C. When "two distinct grounds in support of a single cause of action are alleged, only one of which presents

a federal question", the entire case is within the original jurisdiction of the federal court. Thus the bill of review might fall within the jurisdiction of the district court and therefore be removable if it were, in effect, merely the statement of another, nonfederal, ground for the relief sought in the interpleader action. The question which the bill of review raises, however, is not the validity of the redesignation—a question arguably before the federal court in the interpleader suit—but the validity of the decree, a question not before the federal court. At this stage of the bill of review proceedings,[8] therefore, the case is not properly within the pendent jurisdiction of the district court. The bill of review was not removable as pendent to the interpleader action.

D. The bill of review is not within the original jurisdiction of the district court by reason of any of the special jurisdictional statutes.

Since the district court did not have original subject matter jurisdiction of the bill of review, that case must be remanded to the state court. *American Fire & Casualty Ins. Co. v. Finn, supra.*

VI.

Since the validity of the state decision which controls this case is in question and is to be decided by the state courts, we think the best course of action would be for the district court to hold the interpleader action in abeyance until the validity of the state decree has been determined. If the state court upholds the validity of the decree, the district court should grant judgment for Mrs.

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[7] Hurn v. Oursler, 1933, 289 U. S. 238, 246, 53 S. Ct. 586, 77 L. Ed. 1148, 1154.

[8] We do not decide whether the case would come within the original jurisdiction of the district court if the state court should conclude that the decree was procured by fraud and proceed to a redetermination of the question of Mississippi law presented.

Tighe. If the state court vacates its decree and proceeds to a redetermination of the merits, the district court should await the outcome of that action. As we noted at footnote 8, *supra,* we have not decided the removability of the bill of review action at this later stage of the proceedings.

The judgment of the district court is AFFIRMED in part, and in part VACATED. The case is REMANDED to the district court with directions.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La. (R. 949-968).

Exhibit 2

UNITED STATES of America ..... Plaintiff

v.

Mrs. Hallie Stirling TIGHE et al. ..... Defendants

Civ. A. No. 3019
United States District Court
S. D. Mississippi, Jackson Division
May 18, 1964

Interpleader by United States against claimants to proceeds of National Service Life Insurance policy. The District Court, Mize, J., held that evidence established that the chancellor of Hinds County was correct in holding that the insured veteran was non compos mentis, that a guardian should be appointed for him, and that the guardian should be directed to change the beneficiary on the policy.

Order in accordance with opinion.

1. Mental Health—215

Decree of Hinds County Chancery Court directing guardian to change beneficiary on National Service Life Insurance policy of incompetent ward was not subject to collateral attack, such as claims in federal District Court that such decree had been obtained by fraud. 38 U.S.C.A. § 717(a); Const. Miss. 1890, § 159.

2. Courts—493(2)

By interpleader proceedings instituted by United States to determine to whom proceeds of National Service Life Insurance policy should be paid, federal court acquired full jurisdiction of all matters concerning policy and proceedings concerning deceased insured to exclusion

of chancery court, which had directed guardian of incompetent insured to change beneficiary, or any other state court. 38 U.S.C.A. §§ 717(a), 784.

3. Equity—447(2)

Bill in nature of review must be dismissed where no new evidence introduced would be sufficient to overthrow or set aside decree which had been rendered by chancery court.

4. Interpleader—29

Evidence in interpleader proceeding in federal District Court established that chancellor of Hinds County was correct in holding that veteran was non compos mentis, that guardian should be appointed for him, that guardian should be directed to change beneficiary on veteran's National Service Life Insurance policy. Const. Miss. 1890, § 159; 38 U.S.C.A. § 717(a).

5. Interpleader—29

Record on interpleader proceeding failed to establish any fraud in obtaining decree from Hinds County Chancery Court in guardianship matter.

6. Armed Services—77(5)

It is not necessary under either federal law or Mississippi law, in order to have beneficiary on National Service Life Insurance policy changed by guardian, to notify designated beneficiary or any relatives of insured. 38 U.S.C.A. § 717(a).

7. Insurance—586(2)

There is no vested right to proceeds of insurance policy by named beneficiary until death matures policy. 38 U.S.C.A. § 717(a).

8. Armed Services—77(5)

By tendering money into registry of court, veterans' administration waived its right to accept change of beneficiary on National Service Life Insurance policy. 38 U.S.C.A. §§ 717(a), 784.

Robert E. Hauberg, U. S. Atty., Jackson, Miss., for plaintiff.

Alfred N. Crisler of Crisler, Crisler & Bowling, W. E. Gore, Jr., B. Stirling Tighe of Tighe & Tighe, Jackson, Miss., for defendants.

SIDNEY C. MIZE, District Judge.

The United States of America on August 23, 1960 filed a complaint in interpleader against Mrs. Hallie Stirling Tighe, Mrs. Nola Chiles and Mrs. Bettie Roecker, claimants to the proceeds of a National Service Life Insurance Policy on the life of Samuel Carter Stirling, deceased. The action was brought by the plaintiff under the provisions of the World War Veterans Act of 1924 and the National Service Life Insurance Act of 1940 against the defendants above named, alleging that each of the defendants asserted a claim to the proceeds of a policy of insurance granted by the National Service Life Insurance Company to Samuel C. Stirling now deceased. Samuel C. Stirling, more frequently referred to in the pleadings and testimony was known as Carter Stirling, but entered the service under the name of Samuel C. Stirling. On April 1, 1942 he was granted a policy of insurance in the sum of $10,000 and on April 1, 1950 the insured was granted a renewal of the insurance, being the policy now in dispute. Samuel C. Stirling hereinafter will be referred to as Carter. He was the son of J. B. Stirling, referred to frequently as General. He

formerly had been Attorney General of the State of Mississippi and was named as the original beneficiary in the insurance policy. General Stirling died on April 19, 1950 and on May 1, 1950 the insured, Carter Stirling, executed a change of beneficiary in favor of Mrs. Nola Chiles. She was not related to him, but was a friend and Carter Stirling had dated her off and on for several years. Carter Stirling had previously been married on March 12, 1930 to Charla Vesta Culpepper and to this marriage was born one child, now Mrs. Bettie Hallie Stirling Roecker. About the year 1932 Mrs. Carter Stirling deserted Carter Stirling in Jackson, Mississippi and went to Honolulu and while there divorced Carter Stirling in 1936. The decree of divorce awarded the custody of the child, who was then some five or six years old. The decree of divorce did not award any alimony or any support or maintenance for the child.

The child, Mrs. Roecker, was never at any time named the beneficiary in the policy of insurance and prior to the trial of this lawsuit she had never seen her father but one time after she and her mother went to Honolulu. She returned to Mississippi when she was about sixteen years of age and spent a few hours with her father while in Jackson visiting some relatives. While there her father, Carter Stirling, took her to dinner at the home of Carter's sister, Mrs. Hallie Stirling Tighe. Up until the time of the divorce Carter Stirling kept in contact with his wife by correspondence from time to time and sent some presents and some money to the child. After the divorce Mrs. Stirling remarried and again was divorced from that husband and again was married to her present husband, with whom she is now living in California. Bettie Hallie Stirling married, becoming Mrs. Roecker, has lived in California since that time and has two children.

The three defendants named in the interpleader suit each filed an answer asserting a claim to the proceeds of this policy. Mrs. Hallie Stirling Tighe asserted a claim by virtue of the decree of the Chancery Court of Hinds County, Mississippi directing the guardian of Carter Stirling, N.C.M., Sebastian Moore, to change the beneficiary from Mrs. Nola Chiles to Mrs. Hallie Stirling Tighe.

On February 11, 1956 Carter Stirling was adjudged non compos mentis and William Sebastian Moore was appointed guardian, qualified as such and acted as guardian until after the death of the said Carter Stirling. Carter Stirling died January 3, 1959. On May 28, 1956 William Sebastian Moore, the guardian of Carter Stirling, filed a petition with the Chancery Court of Hinds County, which had jurisdiction of the guardianship matter and of the guardian and of the ward, requesting authority to designate and change the beneficiary in the policy to Mrs. Hallie Stirling Tighe. The Veterans Administration was notified of the filing of the petition and filed its answer on June 1, 1956, neither admitting nor denying the right of the Court to authorize the guardian to change the beneficiary, but apprised the Court that Carter Stirling had a child, Bettie Hallie Stirling Roecker, living in California. On June 25, 1956 the guardian filed a supplemental petition setting out the fact of the said Carter Stirling having a child and praying for authority to designate Mrs. Tighe as beneficiary. On June 27, 1956 the Veterans Administration filed an answer to the supplemental petition, submitting the matter to the Court. On May 21, 1958 the guardian filed with the Chancery Court a petition requesting authority to institute proceedings to designate Mrs. Hallie Stirling Tighe as beneficiary of the estate of the ward, Carter Stirling. Pursuant to the petition of the guardian, the Chancery Court

of Hinds County, Mississippi, entered a final decree on December 19, 1958, allowing the guardian to change the beneficiary on the NSLI policy from Mrs. Nola Chiles to Mrs. Hallie Stirling Tighe, sister of the insured, finding that such change would be to the best interest of the ward. The guardian pursuant thereto executed such change and delivered the same to the Veterans Administration.

On January 3, 1959 the insured died, at a time when Mrs. Hallie Stirling Tighe had been designated as beneficiary on the NSLI policy by the guardian and with the approval, by order, of the Chancery Court of Hinds County.

Mrs. Hallie Stirling Tighe claims the proceeds of the NSLI policy in question by virtue of the change of beneficiary in her favor authorized by the final decree of the Chancery Court of Hinds County and subsequently executed by the guardian of the insured.

Mrs. Nola Chiles claims such proceeds by virtue of her designation by the insured as beneficiary on May 1, 1950, subsequent to the death on April 19, 1950 of J. B. Stirling, the originally named beneficiary, and avers, contrary to the final decree of the Chancery Court dated December 19, 1958, that the insured was competent on and before May 1, 1950.

Mrs. Bettie Roecker claims such proceeds in her name and in the name of the insured's estate, charging that the insured was incompetent on May 1, 1950, after the death of J. B. Stirling, and, therefore, could not legally effect a designation of beneficiary of Mrs. Nola Chiles; hence the proceeds of the policy inured to the estate.

Claimants, Mrs. Chiles and Mrs. Roecker, have in further averments as to their claims charged that the

decree of December 19, 1958 was procured by fraud and hence is voidable upon the collateral attack which they made upon such decree at the trial of this cause, but as a fact failed to prove any fraud.

The initial issue for consideration by the Court is whether the Chancery Court had jurisdiction and authority to enter its final decree authorizing a change of beneficiary on the NSLI policy in dispute. In regard to the consideration of this issue, it is significant that no offer of proof of fraud as against claimant, Mrs. Chiles, was made at the trial of this case, all of the charges of such fraud being levied in support of the claim of Mrs. Roecker; hence the issue of whether the Chancery Court of Hinds County had jurisdiction and authority to enter its decree in December, 1958 is dispositive of the respective claims of claimant, Mrs. Tighe, and claimant, Mrs. Chiles, and that issue may be properly decided purely as a matter of law. It is a matter of record that claimant, Mrs. Chiles, in an attempt to avoid a decision against her upon this issue, amended her pleadings so as to charge the same fraud as was averred by claimant, Mrs. Roecker; however, such issue again becomes simply a matter of law when it is viewed that such assertion in behalf of claimant, Mrs. Chiles, was without any substance whatever. Moreover, claimant, Mrs. Tighe, contends that the argument as laid in her behalf that the Chancery Court had full jurisdiction and authority to make the change of beneficiary on the NSLI policy in dispute, without notice to either of the other claimants, is dispositive of the entire case against both claimant Mrs. Roecker as well as claimant, Mrs. Chiles, when it is further viewed that the assertions of fraud which they make are upon collateral attack of the decree of the Chancery Court in the trial of this case in the United States District Court, and as a matter

of law the said decree of the Chancery Court is not subject to the collateral attack made by said claimants.

General authority for change of beneficiary on National Service Life Insurance policies is found both in the National Service Life Insurance Act and the Veterans Administration Regulations applicable to such policies, as follows:

National Service Life Insurance Act, Title 38 U.S.C.A. § 717(a):

> "The insured shall have the right to designate the beneficiary or beneficiaries of insurance maturing on or after August 1, 1946, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries."

Veterans Administration Regulation 3447 (8.47), admitted in evidence in the request for admissions of claimant, Mrs. Tighe, says:

> "3447 (8.47) BENEFICIARY CHANGES.—The insured shall have the right at any time, and from time to time, and without the knowledge or consent of the beneficiary, to cancel the beneficiary designation or to change the beneficiary, but a change of beneficiary to a person not within the permitted class of beneficiaries set forth in V.A. Regulation 3446 shall not be effective as to insurance which matured prior to August 1, 1946. A change of beneficiary to be effective must be made by notice in writing, signed by the insured, and forwarded to the V.A. by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable, such notices shall be given on blanks prescribed by the V.A.

Upon receipt by the V.A. a valid designation or change of beneficiary shall be deemed to be effective as to the date of execution."

The law of Mississippi for authority of a guardian and the jurisdiction of a Chancery and Equity Court to act in regard to guardians and wards, we find that the Mississippi Constitution of 1890 bestows full jurisdiction upon the Chancery Courts of Mississippi unlike the limited authority which is given to probate courts of some states.

Mississippi Constitution of 1890, Section 159:

"The Chancery Court shall have full jurisdiction in the following matters and cases, viz.:

"(a) All matters in equity; * *

"(e) Cases of idiocy, lunacy, and persons of unsound mind; * * *"

A general statement of the law in this country regarding the power of a guardian to change the beneficiary on his incompetent ward's life insurance policy is found in the annotation styled Power of Guardian of Incompetent to Change Beneficiary in Ward's Life Insurance Policy, 21 A.L.R. 2d 1911, where the authors of that work say:

"* * * In the few cases revealed by an exhaustive search of the point under annotation, it is stated generally that a guardian of an incompetent has no power, without court authority, to change the beneficiary in an insurance policy on the life of his ward. The holdings seem to be based, and rightly so, on the theory that the right to change a beneficiary in an insurance policy is a right personal to the insured, and thus cannot be exercised by a guardian, unless a court decides that it is in the best interests of the ward. * * *"

Also, in that annotation there is cited the case of In Re Degnan, 122 N. J. Eq. 470, 194 A. 789 (1937), a decision of the Supreme Court of New Jersey, where Degnan, the Ward, had two life insurance policies on which his wife was designated beneficiary. The policies reserved the right to the insured to change the beneficiary. Degnan became incompetent and his wife was appointed as guardian for him. Subsequently, his wife obtained an annullment of their marriage and resigned as his guardian. Degnan's brother was then appointed guardian and as such guardian he sought to change the beneficiary on the ward's policy by court authority. The New Jersey Supreme Court allowed the change, stating as follows:

> "* * * The question here presented is, Can the interest of the respondent as beneficiary be terminated and is it expedient for the incompetent to terminate it and to substitute the incompetent's estate as beneficiary? * * * It is proposed here to follow the policy directions strictly, only, instead of the incompetent alone exercising the right to make the change, it will also be exercised by his guardian acting for him under the Chancellor's direction."

See also In Re Reeves, 10 Del. Ch. 324, 92 A. 246 (1915); Maclay v. Equitable Life Assurance Society, 152 U. S. 499, 14 S. Ct. 678, 38 L. Ed. 528 (1894); Parry v. Parry, 316 Mass. 692, 56 N. E. 2d 875 (1944).

The Massachusetts Court held in accordance with the same doctrine as expressed in the New Jersey case that upon authority of the court, the guardian of the incompetent could exercise the same reserved right. That Court said:

> "The Probate Court had full jurisdiction under section 45 in a proper case (see Dolbeare v. Browser,

254 Mass. 57, 149 N. E. 626), to authorize or direct the guardian of the petitioner to exercise the option reserved (by the ward) to change the beneficiaries named in the contract.''

A case applicable is found in the Federal jurisdiction in Murray v. U. S., 107 F. Supp. 290 (1950), U.S.D.C., E. D. Mich., N. D., affirmed, Murray v. U. S., 188 F. 2d 362 (1951) C. A. 6th certiorari denied, Murray v. U. S., 342 U. S. 816, 72 S. Ct. 30, 96 L. Ed. 617 (1951):

In that case the insured veteran was adjudicated insane and a guardian appointed for him in the Probate Court for Genesee County, Michigan. The veteran's National Service Life Insurance Policy was in force with the beneficiary thereon as the insured's wife. He had made the designation prior to his adjudication as an insane person.

Subsequently, after his adjudication as an insane person, his wife divorced him. The guardian then obtained authority of the Probate Court to change the beneficiary on the policy.

The question squarely presented to the United States District Court for its decision was whether the divorced wife, as the originally named beneficiary on the policy at the time of the death of the insured, despite the change of beneficiary by his legal guardian under court order, was entitled to the proceeds of the policy.

The United States District Court considered the above arguments of the wife and as well V.A. Regulation 3447 and the National Service Life Insurance Act itself, providing in effect that the insured alone has the right to change a beneficiary and that that right is not directly conferred upon anybody else but the insured.

The Court also considered authority cited by the wife under her aforesaid stated arguments but found, in each case cited, where a guardian was held not to have the authority to make a change of beneficiary in behalf of his ward, he had acted in each instance without court authority.

The Court reached its decision after citing with approval language from the case of In Re Degnan, supra, where the New Jersey Supreme Court stated in part:

"[A] Probate Court '* * * has inherent power to act as appears for best interest of incompetent person in matters affecting incompetent's property and has specific power to direct incompetent's guardian to exercise a power that is vested in incompetent or subject to incompetent's consent.' "

The Court in this Michigan case authorized the guardian there to make a change in the beneficiary on the policy but did not specifically designate the beneficiary itself, only stating that the persons who had borne the burdens of the incompetent ward's estate should be the ones to profit after his death. In that particular case, the election was made to designate the estate of the ward obviously because his heirs at law had been the persons who had borne the burdens of his estate as an incompetent.

"This court is not prohibited from following the law of the State of Michigan if that law does not seek to usurp powers of the federal government. Furthermore, there is no usurpation here. The National Service Life Insurance Act, 38 USCA, § 801 et seq, is deficient and such deficiency may be corrected by the state law. * * *

"We hold, therefore, that the beneficiary selected by the guardian shall receive the proceeds from the National Service Life Insurance policy of the veteran, because when the guardian acted by order of the Probate Court this had the same legal effect as though the insured himself had made the new designation."

On the issue of whether notice to other parties in the Chancery Court is required, viz., Mrs. Chiles and Mrs. Roecker, the Murray case held, (page 291 of 107 F. Supp.) that "notice of the intended change (of beneficiary) was not given or required under Michigan Probate law."

In the case at bar the same situation as in the Murray case, "no notice given or required", because similarly there is no provision in Mississippi law for such notice.

See also Hardy v. Richards, 98 Miss. 625, 54 So. 76. Mullins' Estate v. Mullins' Estate, 125 So. 2d 93 (1960—Miss.), in which the Hardy v. Richards (1911) case was cited with approval.

[1] A collateral attack cannot be made on the decree of the Hinds County Chancery Court. The decree was entered on December 19, 1958. Mrs. Roecker and Mrs. Chiles learned of this decree immediately subsequent to January 3, 1959, when they made their respective claims to the proceeds of the NSLI policy in question. Despite this knowledge of the existence of the decree, neither of said claimants took any action whatever in said Chancery Court to challenge said decree either as to the jurisdiction and authority of the Chancery Court or as to the propriety of said decree.

[2] The present interpleader suit was filed by the United States against all of the three claimants herein on August 23, 1960, nearly two years after said decree

was entered. At that time the United States District Court assumed full jurisdiction of this case under the provisions of the National Service Life Insurance Act of 1940, as amended, Title 38 U.S.C.A. § 784. The case proceeded toward trial, and in the processing same numerous discovery proceedings were employed between claimant, Mrs. Tighe, and the other two claimants. On or about November 11, 1961, some three years after the rendition of said final decree, and after this case had been pending in the Federal Court for more than a year, claimants Mrs. Roecker and Mrs. Chiles, by their respective counsel, jointly filed in said Chancery Court a "Bill in the Nature of Bill of Review", which purported to make a "direct attack" on the decree of the Chancery Court. This was, of course, at a time when the Federal Court had full jurisdiction of all matters concerning the NSLI policy and proceedings concerning the deceased insured, Samuel Carter Stirling, to the exclusion of said Chancery Court or any other State Court. Said bill in the Chancery Court nevertheless attempted to obtain the relief of setting aside the final decree of the Chancery Court on the basis of the same charges of fraud which had been previously averred in the Federal Court by way of "collateral attack" on said decree.

[3] This bill in the nature of a bill of review must be dismissed because there was not any new evidence introduced in the trial of this case here in this court that would be sufficient to overthrow or set aside the decree that was rendered by the Chancery Court of Hinds County, Mississippi adjudicating Carter Stirling to be non compos mentis, but on the contrary, the testimony in this court shows that the Chancellor was correct in all of his judgments and decrees. The record before this court shows clearly that the Chancellor went into the question of lunacy or persons of unsound mind, and

after having heard all the evidence, reached the conclusion that Carter Stirling was of unsound mind and that at the time the decree was rendered the Chancery Court had full jurisdiction of the matter.

[4] The testimony in the present case shows that the Chancellor was correct and I so concluded in holding that he was non compos mentis and incapable of taking care of his own business affairs, and that a guardian should be appointed for him. This was done under the applicable provisions of the Mississippi law and the Chancellor was fully justified by the testimony produced before him at the hearing in directing the guardian to change the beneficiary from Mrs. Chiles to Mrs. Hallie Stirling Tighe, who was a sister and close to the said Carter Stirling. The record reflects and I so find that she was attentive to him, visited him regularly, took him out for rides, looked after his welfare, and during this period of time no one knew just how long he would live. The Chancellor was justified, as a matter of inference that if he lived at length the one who could be depended upon to care for him, attend to his wants, furnishing him companionship and entertainment, was his sister, Mrs. Hallie Stirling Tighe.

[5] The record before this court is completely barren of any fraud perpetrated by Mrs. Tighe or her attorney upon the courts in procuring a change of beneficiary. The attorney for the guardian of Carter Stirling presented the matter to the Chancellor, produced evidence of the long habitual use of intoxicants by Carter Stirling until the time came when it affected his mind, and the Chancellor was justified in acting upon such testimony. The attorney for the guardian did nothing but what he had a right to do. He advised the court of every fact that was known to him and did not by his conduct mis-

lead the court in any way whatsoever. Every act that he did was one permitted by law and the law is well settled that as long as one is acting within his rights as a matter of law his conduct cannot be termed fraudulent. I find as a fact that not only have the litigants asserting fraud failed to prove same, but on the contrary there was no fraud perpetrated.

[6-8] As is shown by the authorities hereinbefore cited, it is not necessary under the law to have a beneficiary changed by the guardian to notify the designated beneficiary or any relatives of the insured. There is no vested right to the proceeds of an insurance policy by a named beneficiary until death matures the policy. The guardian was guilty of no fraud, as he acted under the direct order of the Chancellor to change the beneficiary to Mrs. Hallie Stirling Tighe. This was done and the Veterans Administration was notified of the change. While it did not accept the change, it did waive the acceptance by tendering the money into the Registry of the Court for the Court to determine under the law which one of the claimants was entitled to the proceeds.

I conclude as a matter of law that the action of the Chancellor in adjudicating the deceased Carter Stirling of unsound mind was correct and that his action was correct in ordering and directing the guardian to change the beneficiary from Mrs. Chiles to Mrs. Hallie Stirling Tighe, that she is entitled to the proceeds of the policy and that the Clerk of this court should be directed to pay to her the proceeds which were paid into the Registry of this Court.

I conclude as a matter of law that the bill in the nature of a review should be dismissed.

Orders may be drawn in accord herewith. (R. 886-902).

Exhibit 3

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 50,464

IN THE MATTER OF THE ESTATE OF SAMUEL CARTER STIRLING, N. C. M.. WILLIAM SEBASTIAN MOORE, GUARDIAN

FINAL DECREE

Came on this day this cause to be heard upon Petition of William Sebastian Moore, duly appointed, qualified, and acting Guardian of the Estate of Samuel Carter Stirling, Non Compos Mentis, wherein he prayed authority of this Court to allow him as such Guardian to change the beneficiary on a certain United States Government life insurance policy of said ward and under which said ward is the insured, namely, National Service Life Insurance Policy No. V 1006-83-34 in the face amount of $10,000.00, designating as beneficiary thereon Mrs. Hallie Stirling Tighe, sister of said ward, in place of the present beneficiary, Mrs. Nola Chiles, and upon due and timely notice to the Veterans Administration, United States Government, and answer filed herein in its behalf by its Chief Attorney in which no objection was made to the petitions of Guardian herein or the relief sought thereby, and the Court having heard and considered evidence and oral testimony of witnesses adduced in open court on this, a regular day of the November, 1958 term of this Court, is of the opinion that the relief sought should be granted, and finds as follows:

1. That under the terms of said policy the insured has the right at any time to change the beneficiary without the knowledge or consent of said beneficiary, and that a beneficiary thereunder has no vested right or interest in the said policy or its proceeds, or as such beneficiary.

2. That the present beneficiary on said policy, Mrs. Nola Chiles, is not a proper or necessary party to this proceeding.

3. That the designation by said ward, as the insured on said policy, of Mrs. Nola Chiles as the beneficiary on and under said policy, on date of May 1, 1950 was at a time when said ward lacked testamentary and mental capacity to make such designation, and further at a time when said ward had become a chronic alcoholic and habitual drunkard and incapable of managing his affairs and carrying on this business.

4. That Mrs. Betty Hallie Stirling Roecker, daughter and only child of said ward and now twenty-eight years of age and a resident of the State of California, departed the State of Mississippi sometime during the year 1932 with her mother, the former wife of said ward who separated from said ward at that time, he now being divorced from said former wife, and that said daughter has since returned to the State of Mississippi on only one occasion and on that one occasion was the visitor of relatives of her mother, only seeing her father, ward herein, for a brief period of several hours. That said ward, after his separation from said daughter's mother, attempted to keep in contact with his said daughter and attempted to furnish support to her during her childhood and minority and did in fact send her presents from time to time at Christmas and birthdays, but that he was overtly discouraged from the same by

the mother of said daughter who after leaving the State of Mississippi became remarried, was divorced from her second husband, and remarried to a third husband, and to the contrary said ward received no encouragement in this behalf whatever from his said former wife, or even from said daughter after she came of the age when such encouragement might have been expected of her. That, consequently said ward has during the life of said daughter been almost completely out of contact with said daughter, having never had the chance or opportunity to be as a father to said daughter or to enjoy the love and affection he might have expected as a father, and in fact has never stood in loco parentis to said child since the year 1932. That as a result thereof, the Court is of the opinion and finds that it could not reasonably be expected that said ward would have ever had the desire or inclination to name said daughter as beneficiary on said policy, as in fact he did not prior to May 1, 1950 and during his competency. That the Court finds as a matter of fact that prior to May 1, 1950 J. B. Stirling, father of said ward, was designated as the beneficiary on said policy and remained as such until his death on April 19, 1950.

5. That Mrs. Hallie Stirling Tighe, only sister of said ward, has in conjunction with Guardian herein and this Guardianship, administered by authority of this Court, cared for and attended the needs of her brother, ward herein, and for a long period of time prior thereto, during his disability and at times when he was unable to care for or attend himself, including supplementing the income received by said ward as compensation from the United States Government with monies of her own. That the Court is of the opinion and finds that it would be to the best interest of said ward that his said sister be designated as beneficiary on said life insurance policy

and to his best interest that a change be made accordingly so that said sister may be so designated and that she be named as said beneficiary in place of the present named beneficiary, Mrs. Nola Chiles, the Court further finding that it would be against and detrimental to the best interests of said ward for the said Mrs. Nola Chiles to remain and continue as such beneficiary.

THEREFORE, BE IT, AND IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Guardian herein is authorized and directed to change the beneficiary on said life insurance policy, designating as beneficiary thereon Mrs. Hallie Stirling Tighe, sister of said ward, in place of Mrs. Nola Chiles, the present beneficiary thereon, and is authorized and directed to execute the proper instruments to effect such change of beneficiary, however allowing the terms of payment on and under said policy to remain as now designated, namely "Option 1" or lump sum payment subsequent to the death of ward herein, as the insured on and under said policy.

ORDERED, ADJUDGED AND DECREED this the 19 day of December, 1958.

/s/ A. F. SUMMER

CHANCELLOR

(R. 34-38)

Exhibit 4

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

Civil Action No. 3019

UNITED STATES OF AMERICA ..... Plaintiff

vs.

MRS. HALLIE STIRLING TIGHE, et al ..... Defendants

"ANSWER OF DEFENDANTS, MRS. BETTY HALLIE STIRLING ROECKER AND WILLIAM SEBASTIAN MOORE, ADMINISTRATOR OF THE ESTATE OF SAMUEL C. STIRLING, DECEASED.

* * *

"* * * 3. These defendants admit that the Chancery Court of Hinds County, Mississippi, in December, 1958, found that the insured was a (R 38) chronic alcoholic incapable of managing his own affairs and further allege that said Court also adjudicated in said proceeding that the insured, Samuel C. Stirling, was not mentally competent to execute a change of beneficiary on said insurance policy in favor of Mrs. Nola Chiles on May 1, 1950, and that the attempted change of beneficiary on said date to Mrs. Nola Chiles was null and void and of no effect. These defendants admit that said Court entered an Order dated December 19, 1958, authorizing the insured's guardian to execute a change of beneficiary in favor of Mrs. Hallie Stirling Tighe and to elect a lump sum method of settlement in her favor, but these Defendants deny that said Court had any jurisdiction

or lawful authority to authorize the Guardian of the insured to change the beneficiary in said policy *and allege that that portion of the Order of said Court dated December 19, 1958, was null and void for that reason and for the further reason that said Court was fraudulently induced to enter that portion of said Order authorizing the Guardian to change the beneficiary on said policy to Mrs. Hallie Stirling Tighe.* * * * (Italics supplied).

"* * * 5. * * * For further answer to the Complaint exhibited against them herein and in support of the claim of these Defendants to the unpaid proceeds of said National Service Life Insurance Policy these Defendants state: * * *".

"* * * (5) The attempted designation by the Guardian of the incompetent insured's estate of Mrs. Hallie Stirling Tighe as beneficiary under said insurance policy on December 19, 1958, was void and of no effect because: * * *

"* * * (b) *That portion of the Decree* dated December 19, 1958, of the Chancery Court of Hinds County, Mississippi, authorizing the Guardian to change the beneficiary to Mrs. Hallie Stirling Tighe *was void and of no effect* because Mrs. Betty Hallie Stirling Roecker, the daughter and nearest relative of the (R 40) deceased was not summoned and made a party to said proceeding or given any notice thereof or opportunity to appear and be heard therein *and because said Court was fraudulently induced to enter that portion of said Order authorizing the change of said beneficiary to the said Mrs. Hallie Stirling Tighe.* * * *" (Italics supplied). R. 40, 41, 42, 43, 44).

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 50,464
(Civil Action No. 3219)

MRS. BETTY HALLIE STIRLING ROECKER, Individually and as Administratrix of the Estate of Samuel Carter Stirling, Deceased, and Mrs. Nola Chiles ..... Complainants

Vs.

MRS. HALLIE STIRLING TIGHE ..... Defendant

BILL IN THE NATURE OF BILL OF REVIEW

Comes now Mrs. Betty Hallie Stirling Roecker, individually and in her capacity as Administratrix of the Estate of Samuel Carter Stirling, deceased, and Mrs. Nola Chiles, complainants, and file herewith their Bill in the Nature of Bill of Review against Mrs. Hallie Stirling Tighe, defendant, *praying for an Order of this Court vacating and setting aside that certain Decree rendered by this Court on December* 19, 1958, in Cause No. 50,464, and in support thereof respectfully show: ***

19.

"* * * *Complainants charge that the Decree* of this Court in said cause dated December 19, 1958, *authorizing the Guardian to redesignate the* (R 282) *defendant Mrs. Hallie Stirling Tighe as beneficiary under said Policy is null and void* on its face for the reasons that:

(a) This Court had no power or authority under the laws of the State of Mississippi to authorize said

Guardian to change the beneficiary on the life insurance policy of the incompetent ward.

(b) Said Decree was rendered in an ex parte proceeding without notice to or summons for these complainants who were necessary parties to said proceedings and this Court was without jurisdiction to render said Decree.

(c) The facts found by this Court on which said Decree was based wholly failed to show that the change of beneficiary under said Policy to the defendant Mrs. Hallie Stirling Tighe was for the best interest of the Estate of the incompetent or was in any way for the benefit of the Estate of the incompetent.

20.

Complainants charge that the Decree of this Court dated December 19, 1958, Exhibit "7" hereto, *was procured under circumstances which constitute fraud,* which induced the rendition of said Decree, which circumstances are as follows:

At all of the times material hereto B. Stirling Tighe, Attorney at Law, Jackson, Mississippi, was acting as Attorney for and representing said Guardian in said Guardianship proceedings. That the Attorney for the Guardian is the son of the defendant Mrs. Hallie Stirling Tighe and was the nephew of the ward, Samuel Carter Stirling. He is the first cousin of the complainant Mrs. Betty Hallie Stirling Roecker and at the time of the filing of the Petition in said cause marked Exhibit "1" hereto, he knew that the complainant Mrs. Betty Hallie Stirling Roecker was the daughter of the ward, the nearest next of kin of the ward and the sole and only heir at law of the ward. Notwithstanding this knowledge, said Petition, Exhibit '1" hereto, represented to the

Court that the defendant, Mrs. Hallie Stirling Tighe was "the sister and next of kin of said ward" and concealed from this Court that the ward did in fact have a daughter who was the nearest next of kin.

Said Petition, Exhibit "1" hereto, in which the Guardian prayed for authority to redesignate Mrs. Hallie Stirling Tighe as beneficiary under said policy was presented to the division of this Court presided over by Judge Robertson, and this Court in conference with the Attorney for the Guardian, advised that it doubted that this Court should act on said Petition without giving notice to the beneficiary under said policy. After Answer to said Petition filed by the United States Veterans Administration, Exhibit "2" hereto, said Guardian filed in said cause a Supplemental Petition, Exhibit "3" hereto, wherein he affirmed "That upon the information of said Guardian, said ward did in fact have a natural child, namely, Bettie Hallie Stirling, who was born of a marriage between said ward and Mrs. Charla Vesta Culpepper Stirling on December 17, 1930". After filing of said Supplemental Petition, a further conference was had by the Attorney for said Guardian with Chancellor Robertson of this Court and this Court for the first time received knowledge that the ward did in fact have a daughter who was the nearest of kin. During said conference this Court advised the Attorney for the Guardian that it felt that Mrs. Chiles, the beneficiary, and Mrs. Betty Hallie Stirling Roecker (R 284), the daughter, should be summoned into Court and given an opportunity to be heard on the original and Supplemental Petitions. The Attorney for the Guardian thereupon requested that the Petitions be held in abeyance.

There were no further proceedings in said cause with reference to the change of beneficiary on the insurance

policy of the ward until the filing of the Petition of the Guardian for authority to initiate proceedings to change the beneficiary to the estate of the ward and to pay attorney's fees therefor, Exhibit "5" hereto. Prior to the filing of this Petition, the Attorney for the Guardian carried on correspondence with the complainant Mrs. Roecker wherein he as Attorney for the Guardian advised Mrs. Roecker that he would, through the Guardian, petition the Court to allow the Guardian to change the beneficiary on said policy to the estate of the ward if Mrs. Roecker would assign to his mother, the defendant Mrs. Hallie Stirling Tighe, one-half of the interest of Mrs. Roecker in the estate of her father, such assignment being in lieu of attorney's fees to him for services in the matter since under Federal Law payment of attorney's fees would not be allowable in such a case. There is attached hereto and incorporated herein as Exhibit "9", a letter from the Attorney for the Guardian to Mrs. Roecker dated November 21, 1957, and there is attached hereto and incorporated herein as Exhibit "10", a letter from the Attorney for the Guardian to Mr. E. B. Williams dated February 7, 1958.

That during the course of said correspondence, the complainant Mrs. Roecker advised the Attorney for the Guardian of her willingness to have the beneficiary in the policy changed to the estate, and although not agreeing (R 285) to assign her one-half interest in the remainder of the estate of her father to the mother of the Guardian's Attorney, the complainant Mrs. Roecker, through Mr. E. B. Williams, her Attorney, advised the Attorney for the Guardian of a willingness to proceed on a contingent fee basis for such services. That on May 21, 1958, a Petition for authority of the Guardian to Initiate Proceedings to Change the Beneficiary to the Estate of the Ward and for authority of the Guardi-

an to pay his Attorney fifty percent of whatever amount may be recovered by the estate of the ward for a change of beneficiary, said Petition being Exhibit "5" hereto, was presented to the Court. The Court acting through Chancellor Robertson on said date May 21, 1958, entered the Order attached as Exhibit "6" hereto granting the Guardian authority to initiate proceedings to change the beneficiary to the Estate of the ward but holding in abeyance any allowance of Attorney's fees until termination of the matter, at which time a reasonable fee would be allowed based on the work done and extent to which the estate of the ward had been benefited. That in said Petition for authority to initiate proceedings to change the beneficiary to the estate, Exhibit "5" hereto, the Guardian represented to the Court that he desired to initiate such proceedings to effect a change in said beneficiary to the estate of the ward feeling that the same would be to the best interest of the estate of the ward. Subsequently the Attorney for the Guardian conferred further with Mr. E. B. Williams, Attorney for the complainant, Mrs. Roecker, and upon being advised by Attorney Williams that he expected to participate in the fee to be paid in the matter, the Attorney for the guardian declined to go forward with the proceeding to change the beneficiary to the estate of the ward, notwithstanding the fact that the Court, acting through Judge Robertson, had granted him authority to so proceed. (R 286) The Attorney for the Guardian, not being able to effectuate a satisfactory fee arrangement for himself through proceedings to change the beneficiary to the estate, thereafter took no further action toward that end and in December of 1958, without further consulting Judge Robertson of this Court who was still at such time and has been at all times one of the Chancellors of said Court, presented to Chancellor A. F.

Summer of this Court who was then newly appointed, the earlier Supplemental Petition for change of said beneficiary to the defendant Mrs. Hallie Stirling Tighe, and obtained the consent of Chancellor Summer to a hearing on that Petition for December 19, 1958, without any notice to the Complainants herein or opportunity by the Complainants to appear and be heard in said proceedings. That the Attorney for said Guardian thereupon presented the said Supplemental Petition to change the beneficiary to Mrs. Hallie Stirling Tighe, Exhibit "5" hereto, to Judge Summer of this Court and never at any time notified or advised Judge Summer before the hearing of said Petition that the matter had previously been under the jurisdiction of Judge Robertson and that Judge Robertson had prior thereto entered the Order authorizing the Guardian to initiate proceedings to change the beneficiary to the estate, Exhibit "6" hereto, all contrary to the Rules of Practice and Procedure then in force and effect in this Court and in violation of his fiduciary duty to the ward and to the Court to make full disclosure of all facts, material to a decision by the Court on the matter involving the estate of the incompetent.

That at the ex parte hearing before Judge Summer on December 19, 1958, the only evidence presented to Chancellor Summer in said proceeding was that in support of the allegation that the ward was incompetent at the time (R 287) of designation of Mrs. Chiles as beneficiary and that Mrs. Hallie Stirling Tighe should be designated as beneficiary under said Policy. That there exists substantial evidence in the form of lay testimony and medical opinion showing that the ward was not incompetent at the time of designation of Mrs. Chiles as beneficiary. That there exists substantial evidence that it could be reasonably expected that the ward

had he continued competent, would have continued his close friend and acquaintance Mrs. Chiles as the designated beneficiary under said Policy or that he would have designated his daughter and nearest next of kin, Mrs. Roecker as beneficiary under said policy.

That there exists substantial evidence that there was a close bond of love and affection between the ward and his daughter, Mrs. Roecker, together with the fact that the ward had provided a support allowance from the Government for his daughter and was in frequent correspondence with her and often sent her presents. That the existence of such facts was well known by the Attorney for the Guardian in said proceedings and the evidence thereof was readily available to him, but said Attorney wholly failed to present such facts to the Court and thereby concealed such facts from the Court, all of which was substantial material evidence to be considered by the Court in arriving at its decision as to what would be to the best interest of the estate of the ward and what the ward, had he continued competent, could have reasonably been expected to do with reference to the beneficiary under said Policy. That the Attorney for said Guardian in presenting said proceeding, was in truth and in fact acting in a dual capacity, on the one hand representing the Guardian of said (R 288) incompetent and on the other hand acting for the benefit of his mother in changing the beneficiary under said policy and under such circumstances the Attorney for said Guardian was under the highest duty to make full and complete disclosure to the Court of all facts on both sides of the issues presented to the Court and notwithstanding this duty, the evidence which was against the change of beneficiary in said policy to the mother of the Attorney for the Guardian was not presented to the Court and thereby concealed from the

Court, all of which was calculated to and did mislead the Court in arriving at its decision in said matter.

Complainants further show that in accordance with the customs and practices before this Court, if it had been called to the attention of Judge Summer that Judge Robertson had previously handled and considered the same matter, Judge Summer would not have proceeded without having first consulted Judge Robertson thereasto, which complainants charge would have led to a full and fair hearing on the matter and would not have resulted in the Decree rendered authorizing change of beneficiary to the defendant Mrs. Hallie Stirling Tighe. * * *". (Italics supplied). (R. 253, 258-267).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

Civil Action No. 3019

UNITED STATES OF AMERICA ..... Plaintiff

Vs.

MRS. HALLIE STIRLING TIGHE, et al ... Defendants

ANSWER OF DEFENDANT MRS. BETTY HALLIE STIRLING ROECKER TO INTERROGATORIES PROPOUNDED TO HER BY DEFENDANT MRS. HALLIE STIRLING TIGHE.

Come now Mrs. Betty Hallie Stirling Roecker, one of the defendants in the above cause, and answering the Interrogatories propounded to her by the defendant, Mrs. Hallie Stirling Tighe, states:

ANSWER TO INTERROGATORY NO. 1

The following are the circumstances relied on by this defendant in support of her charge that the Chancery Court of the First Judicial District of Hinds County, Mississippi, *was fraudulently induced to enter its Order* dated December 19, 1958, authorizing William Sebastian Moore, Guardian of Samuel Carter Stirling, non compos mentis, *to effect a change of beneficiary under the National Service Life Insurance policy involved in this suit from Mrs. Nola Chiles to Mrs. Hallie Stirling Tighe,* viz: (Italics supplied).

On February 11, 1956, Samuel Carter Stirling was adjudged a non compos mentis and William Sebastian

Moore was appointed as his Guardian in Cause No. 50,464 in the Chancery Court of the First Judicial District of Hinds County, Mississippi.

(R 71) On May 28, 1956, a Petition was filed in said guardianship proceeding by the Guardian for authority of the Court to redesignate the beneficiary on said insurance policy as Mrs. Hallie Stirling Tighe as principal beneficiary with B. Stirling Tighe and Mrs. Robert Abercrombie, Jr., as joint alternate beneficiaries. Said Petition stated that Mrs. Hallie Stirling Tighe was "the sister and next of kin of said ward". The United States Veterans Administration was made a party respondent to said Petition.

At the time of the filing of said Petition and at all of the times referred to herein, B. Stirling Tighe was Attorney for said Guardian. B. Stirling Tighe is the son of Mrs. Hallie Stirling Tighe and was the nephew of the ward. B. Stirling Tighe was a first cousin to Mrs. Betty Hallie Stirling Roecker and at the time of filing of said Petition knew that she was the daughter of the ward and his nearest next of kin and sole and only heir at law.

On June 1, 1956, the Administrator of Veterans Affairs answered the Petition stating that it took a disinterested position with reference to the relief prayed for and called to the Court's attention that the sister of the ward was not his next of kin but he was believed to have a natural child, Mrs. Betty Hallie Stirling Roecker.

On June 25, 1956, a Supplemental Petition of the Guardian was filed wherein it was stated that the ward did in fact have a natural child, but there was no love and affection between the ward and child and that the

ward would have favored his sister, Mrs. Hallie Stirling Tighe as beneficiary. The Petition prayed for authority to change the beneficiary to Mrs. Hallie Stirling Tighe as principal beneficiary and to B. Stirling Tighe and Mrs. Robert Abercrombie, Jr. as joint alternate beneficiaries.

The Veterans Administration answered said Supplemental Petition maintaining a neutral position and made no recommendation in regard to the change of beneficiary prayed for in the Petition.

(R 72) There were no further proceedings in said cause with reference to the change of beneficiary on said insurance policy until May 21, 1958, when the Guardian of the ward filed a Petition in said cause for authority to initiate proceedings to change the beneficiary on said life insurance policy to the estate of the ward and for authority of the Guardian to employ Tighe & Tighe as his Attorneys for this purpose on a fifty percent (50%) contingent basis or on a suit fee basis to be determined by the Court.

The following letters, true copies of which are hereto attached and made a part of this Answer, were written by B. Stirling Tighe, Attorney for the Guardian, to Mrs. Betty Hallie Roecker and Mr. E. B. Williams, her Attorney prior to the filing of said Petition on May 21, 1958:

1. Letter dated November 21, 1957 from B. Stirling Tighe to Mrs. Betty Hallie Roecker.

2. Letter dated January 22, 1958, from B. Stirling Tighe to Mrs. Betty Hallie Roecker.

3. Letter dated February 7, 1958 from B. Stirling Tighe to Mr. E. B. Williams, Attorney for Mrs. Roecker.

4. Letter dated March 5, 1958, from B. Stirling Tighe to Mr. E. B. Williams, Attorney for Mrs. Roecker.

5. Letter dated March 27, 1958, from B. Stirling Tighe to Mr. E. B. Williams, Attorney for Mrs. Roecker.

6. Letter dated May 7, 1958, from B. Stirling Tighe to Mr. E. B. Williams, Attorney for Mrs. Roecker.

The Veterans Administration answered the Petition of the Guardian for authority to initiate proceedings to change the beneficiary to the estate and pay Attorney's fees taking a neutral position as to the change of beneficiary, but suggesting to the Court that it have no authority to enter a Decree authorizing payment of fifty percent (50%) amount recovered from insurance to Attorneys.

On May 21, 1958, an Order was entered on the Petition filed May 21, 1958, whereby the Guardian was authorized to initiate a proceeding to change (R 73) the beneficiary on said insurance policy to the estate of the ward but that the matter of Attorney's fees for so doing would be held in abeyance until termination of the matter, at which time the Court would then determine a reasonable Attorney fee based on the amount of work involved and to what extent the ward had been benefited. This Order was signed and entered by Chancellor Stokes Robertson, Jr., he being one of the two Chancellors of the Chancery Court of the First Judicial District of Hinds County, Mississippi.

The following letters, true copies of which are hereto attached, were written by B. Stirling Tighe, Attorney for the Guardian, to Mr. E. B. Williams, Attorney for Mrs. Roecker, thereafter, viz:

1. Letter dated June 18, 1958 from B. Stirling Tighe to Mr. E. B. Williams.

2. Letter dated June 23, 1958, from B. Stirling Tighe to Mr. E. B. Williams.

On December 19, 1958, a hearing was had on the Supplemental Petition of the Guardian filed June 25, 1956, to change the Beneficiary on the insurance policy to Mrs. Betty Hallie Stirling Roecker. This Supplemental Petition was presented to and the hearing held before Judge Al Summers, one of the two Chancellors of said Court. At the time this Petition was presented and at all of the times material hereto, Judge Robertson continued as one of the Chancellors of said Court.

Pursuant to the hearing, Chancellor Summers entered a Decree dated December 19, 1958, authorizing the Guardian to change the beneficiary on the insurance policy to Mrs. Hallie Stirling Tighe.

At the time of the hearing before Chancellor Summers on December 19, 1958, on the Supplemental Petition dated June 25, 1956, Chancellor Summers was unaware that the Petition of the Guardian dated May 21, 1958, to change the beneficiary to the estate had been presented to his Co-Chancellor, Judge Robertson, and that Judge Robertson had entered an Order dated May 21, 1958, (R 74) authorizing the Guardian to initiate proceedings to change the beneficiary on the insurance to the estate. At the time of the hearing on December 19, 1958, for authority to change the Beneficiary to Mrs. Hallie Stirling Tighe, B. Stirling Tighe, the Attorney for the Guardian, did not feel that it was necessary to bring to the attention of Judge Summers that an Order had been entered on May 21, 1958, by Judge Robertson authorizing the Guardian to initiate proceedings to change

the Beneficiary to the estate. This Defendant, Mrs. Betty Hallie Stirling Roecker, is the daughter, nearest next of kin and sole and only heir at law of the insured and she was never served with process or given any notice of or opportunity to be heard at the proceedings before the Chancery Court on December 19, 1958, which resulted in the Decree of the Court in changing the Beneficiary to Mrs. Hallie Stirling Tighe, mother of the Attorney for the Guardian. * * *". (R. 65-70).